



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Public Records Division

Manza Arthur
Supervisor of Records

November 15, 2024
SPR24/2983

Helen Rush-Lloyd
Records Access Officer
Department of Public Health
250 Washington Street
Boston, MA 02108

Dear Ms. Rush-Lloyd:

I have received the petition of Jonathan Gerhardson appealing the response of the Department of Public Health (Department/DPH) to a request for public records. See G. L. c. 66, § 10A; see also 950 C.M.R. 32.08(1). On October 16, 2024, Mr. Gerhardson requested the following:

As I understand it the deadline for municipalities to submit reports on how they have spent any opioid settlement funds in FY2024 is October 30, but some reports may have already been submitted.

I am seeking to obtain reports for either all reporting municipalities, or at least all municipalities receiving more than \$35k. ...

The Department responded on October 21 and October 31, 2024. Unsatisfied with the Department's response, Mr. Gerhardson petitioned this office, and this appeal, SPR24/2983, was opened as a result.

The Public Records Law

The Public Records Law strongly favors disclosure by creating a presumption that all governmental records are public records. G. L. c. 66, § 10A(d); 950 C.M.R. 32.03(4). "Public records" is broadly defined to include all documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency or municipality of the Commonwealth, unless falling within a statutory exemption. G. L. c. 4, § 7(26).

It is the burden of the records custodian to demonstrate the application of an exemption in

order to withhold a requested record. G. L. c. 66, § 10(b)(iv); 950 C.M.R. 32.06(3); see also Dist. Attorney for the Norfolk Dist. v. Flatley, 419 Mass. 507, 511 (1995) (custodian has the burden of establishing the applicability of an exemption). To meet the specificity requirement a custodian must not only cite an exemption, but must also state why the exemption applies to the withheld or redacted portion of the responsive record.

If there are any fees associated with a response, a written good faith estimate must be provided. G. L. c. 66, § 10(b)(viii); see also 950 C.M.R. 32.07(2). Once fees are paid, a records custodian must provide the responsive records.

Current Appeal

In his appeal petition, Mr. Gerhardson argues the following:

The issue is that records that I believe DPH is supposed to be maintaining are in the possession of JSI Inc, under contract from BSAS (caremass.org) and because the contractor, not DPH has them, I am being told I cannot obtain them via records request.

...

Despite the subdivision agreement requiring reports to be submitted to the EOHHS, this is not what is happening. Instead, reports are being submitted to a private contractor hired by the Bureau of Substance Addiction Services.

The use of a private contractor in this way should not release the EOHHS from their responsibility to maintain appropriate governmental records and respond to records requests.

The Department's October 21st and October 31st Responses

In its October 21, 2024 response, the Department explains the following:

The municipal reports get submitted to CAREMASS using a form on a portal; they do not get submitted as individual documents. This form is due on Oct. 30th and then gets cleaned and compiled by the CAREMASS team in order to upload it to the Municipal Opioid Abatement Funds Expenditure Dashboard. It is estimated that this process will be complete by early December. It will most likely not be possible to obtain an individual municipality report before the data is uploaded.

Additionally, in its October 31, 2024 response, the Department provides a hyperlink to a website with some of the data Mr. Gerhardson seeks, and further explains the following:

DPH does not have any responsive records in its custody or control in response to your request for a copy of the FY2024 municipal opioid expenditure reports. The data is being collected by the DPH vendor CAREMass and will be processed and entered into a public-facing dashboard. It should be available in December 2024.

Agency Relationship

The Department is advised that the duty to comply with requests for records extends to those records that exist and are in the possession, custody, or control of the custodian of records at the time of the request. See G. L. c. 66, § 10(a)(ii). Further, in accordance with the Public Records Law, custodians are expected to use their superior knowledge of the records in their custody to assist requestors in obtaining the desired information. See 950 C.M.R. 32.04(5). Additionally, public records must be maintained and kept in a manner that allows access by the general public, as they are subject to mandatory disclosure upon request. G. L. c. 66, § 10(a); see also Reinstein v. Police Comm'r of Boston, 378 Mass. 281, 289-90 (1979).

Where a public entity contracts with a third party to fulfill its public duties, and the public entity exercises control over that third party, an agency relationship is created. See Fifty-one Hispanic Residents of Chelsea v. School Committee of Chelsea, 421 Mass. 598, 607 (1996) (while subject to control of a public entity as a principal for purposes of performing public duties, private university is a public agent). Wherever a record custodian keeps original public records in a location other than the government building, the custodian has a duty to make the public records available in a location convenient to the general public for inspection and copying.

In this case, where it appears that an outside vendor may have acted as an agent on behalf of the Department, it is unclear whether the records for the Department's agents were searched. As such, I find that the Department must provide additional information detailing its search in order to determine if the Department has met its burden under G. L. c. 66, § 10(a)(ii) to provide records that are in the possession, custody, or control of the custodian of records at the time of the request.

Conclusion

Accordingly, the Department is ordered to provide Mr. Gerhardson with a response to the request, provided in a manner consistent with this order, the Public Records Law and its Regulations within ten (10) business days. A copy of any such response must be provided to this office. It is preferable to send an electronic copy of the response to this office at pre@sec.state.ma.us.

Sincerely,

A handwritten signature in black ink, appearing to read "Manza Arthur", written in a cursive style.

Manza Arthur
Supervisor of Records

cc: Jonathan Gerhardson